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Supreme Court of the United States

October Term, 1968

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No. 1029

JOHN J. DE LURY, Individually, and as President, JOHN J. CONROY, Individually and as Treasurer, etc., of UNIFORMED SANITATIONMEN'S ASSOCIATION, LOCAL 831, INTERNATIONAL BROTHERHOOD OF TEAMSTERS AND CHAUFFEURS, etc.,

Appellants,

vs.

THE CITY OF NEW YORK,

Appellee.

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

PAUL O'DWYER
Counsel for Appellants
50 Broad Street
New York, New York 10004

W. BERNARD RICHLAND
MORRIS WEISSBERG
JOHN J. DE LURY, JR.
Of Counsel

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Since this Court will determine whether to review the decision appealed from either as a direct appeal or by granting certiorari (28 U.S.C. §2103; *Anonymous Nos. 6 and 7* v. *Baker,* 360 U.S. 287) it would be pointless for us to further extend the arguments set forth in Points 1 and 2 of our Jurisdictional Statement and demonstrate again that the statutes which we are challenging were thoroughly discussed in, and their validity passed upon by, the New York courts.

Nor would it seem necessary to demonstrate the obvious fact that all of the questions which we have presented are

live and significant, affect literally hundreds of thousands of employees of a multitude of state and municipal agencies and will arise again and again until this Court resolves them.

There are, however, a few matters urged by Appellee in regard to Points 3 and 4 of the Jurisdictional Statement to which we feel a reply might be deemed appropriate.

I

Appellee seeks to dismiss appellants' proposed Questions 3 and 4, whether the Taylor Law unconstitutionally deprived them of due process of law and of the equal protection of the laws, by prohibiting them from striking, and by commanding them to continue to work for the Government of the City of New York, against their will, without making any provision for payment of just compensation for such continued unvoluntary labor.

Appellants' motion (p. 22) argues that these questions were not raised at the trial.

But in our Jurisdictional Statement (p. 7), we quoted the Trial Court's summary decision, which sustained the constitutionality of the Taylor Law without allowing any argument or discussion of the questions of law involved. The Court concluded its summary decision as follows: "So don't talk about the constitutionality" (77).*

These questions were raised as Point IV (pp. 36-55) in appellants' brief in the Appellate Division of the New York

* All references are to pages of the printed Record in the New York Court of Appeals, except as otherwise noted.

Supreme Court; and as Point V (pp. 44-58) in appellants' brief in the New York Court of Appeals. A summary of appellants' argument is printed preceding the opinion of the New York Court of Appeals on page A3 of the Appendix to our Jurisdictional Statement.

More than twelve of the fourteen pages in the opinion of the New York Court of Appeals are devoted to a discussion of that Court's opinion that the Taylor Law prohibition of strikes by public employees does not deprive public employees of due process of law, or of the equal protection of the laws.

Since these constitutional questions were thus presented and considered, and since they were actually decided by the New York Court of Appeals in this case, there is no merit to appellee's argument that these questions were not properly or timely raised in the courts below.

II

Appellee argues further (p. 22) that these constitutional arguments, if made in the courts below, would not have excused appellants' contempt in violating the anti-strike injunction, because the court had jurisdiction of the person and the subject matter, and, therefore, it could punish the appellants for violating the injunctions.

But in the New York courts the appellants appealed (3, 5) from the order, dated February 5, 1968, which granted the anti-strike injunction (7, 8), as well as from the orders (11, 17) which adjudged them guilty of violating a prior

ex parte anti-strike injunction order, dated February 2, 1968 (25).

The appeal from the anti-strike injunction order of February 5, 1968, properly presents the question of the constitutionality of the anti-strike provisions of the Taylor Law.

Appellants' alleged disobedience of the anti-strike injunction order of February 5, 1968, did not affect their right to direct appeal from the decision of the Trial Court sustaining the constitutionality of the anti-strike provisions of the Taylor Law. *United States* v. *United Mine Workers*, 220 U.S. 258, 293.

III

Appellee argues further (p. 23) that the Taylor Law does not deprive appellants of due process of law, or of the equal protection of the laws, because it does not cause involuntary servitude by commanding performance of work; and that it "merely prohibits concerted work stoppages."

Appellee thus seeks to distinguish between an affirmative command to perform work, and a negative prohibition of "work stoppages," by arguing that the Taylor Law constitutionally prohibited "*concerted* work stoppages" (emphasis supplied).

But this Court has said that "It is not a violation of the Sherman Act for laborers *in combination* to refuse to work"; and that "the Clayton Act * * * does recognize an absolute right of employees to work or cease working ac-

cording to their own judgments." *Hunt* v. *Crumboch*, 325 U.S. 821, 824, 825 footnote (emphasis supplied).

In *National Protective Association of Steamfitters* v. *Cumming*, 170 N.Y. 315, the Court reviewed the history of statutes enacted in England, beginning with the first Statute of Labourers in 1349, which provided that every able-bodied man and woman "shall be bounden to serve him which shall so require him"; and continuing up to the Act of 1800 which provided for three months' imprisonment of any workman who "enters into any combination to obtain an advance of wages, or lessen or alter the hours of work". The Court said that these statutes "have at last been swept away"; and that they are "hostile not only to the statute law of this country, but to the spirit of our institutions". 170 N.Y. at 332, 333.

The Taylor Law amounts to a twentieth century re-enactment of the English Statute of Labourers of 1349. Its effect is to make every man who works for the government "bounden to serve" the government that employs him.

The argument that the Taylor Law does not command continued performance of involuntary labor, because it ONLY prohibits a "concerted" stoppage of work, is a transparent technicality.

"Concerted" stoppage of work is the only effective means available to workmen to induce an employer to make better terms with them. *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U.S. 184, 209; *Labor Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 234.

The right to strike is the foundation that enables a worker to participate in fashioning his own economic freedom from dependence upon and subservience to his employer; and it loosens the compulsions exerted on him by his need for money to buy things that he needs or wants for himself and his family.

Today, government is the largest employer of labor, and it is constantly expanding into activities formerly carried on by private industry.

Other countries, particularly England, France, Italy and the Scandinavian countries, have nationalized some or all of their industries, and they have made government employees out of the workers in such industries. Yet, they have not found it necessary to prohibit strikes in such industries; and when such strikes occurred, even a strike by employees of the Bank of France, the governments affected have not asked their courts to enjoin such strikes, and to imprison the strikers for engaging in illegal strikes against the government.

In our country, we have regulated, but not prohibited strikes, because we know from our deepest instincts that when we prohibit strikes, we shackle our own freedom.

Free men work voluntarily for wages, and under conditions to which they agree. But when the government compels them to continue to work for it against their will for wages that the government fixes, then they are no freer than the workers in the Communist and Fascist dictatorships, whom such governments compel to continue to work for government-fixed wages.

The men who wrote our Constitution knew that the government might have need to take the property of citizens without their consent. In the Constitution, they gave that power to the government, but they also imposed on the government the obligation to pay just compensation for such property. The government should do no less, when it takes the labor of a human being without his consent.

In our Jurisdictional Statement (p. 40), we cited *Wolff Packing Co.* v. *Industrial Court,* 262 U.S. 522, 541, as holding that except in the military service, a statute cannot constitutionally prohibit a strike and command continuation of uninterrupted service by employers and employees; and we cited *Wilson* v. *New,* 243 U.S. 332, 353, as holding that when a statute prohibits a strike and commands continuation of uninterrupted services on the ground that it is necessary in the public interest, then the workers affected have a constitutional right to judicial review of the fixation of their wages, to determine whether they are so inadequate as to amount to a deprivation of property without due process of law.

Appellee's motion has passed these cases by in silence, without showing how the Taylor Law can constitutionally prohibit strikes by public employees, without making some provision for fixing just compensation for the continued involuntary labor which it commands workers to continue to perform for the government, against their will.

Conclusion

Appellee's motion to dismiss the appeal should be denied, and jurisdiction of the appeal should be noted.

March, 1969.

Respectfully submitted,

PAUL O'DWYER
Counsel for Appellants

W. BERNARD RICHLAND
MORRIS WEISSBERG
JOHN J. DE LURY, JR.
Of Counsel